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NO. 84-990

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY
a Corporation, PETITIONER

v.

STATE OF ILLINOIS, DEPARTMENT OF TRANSPORTATION; JOHN D. KRAMER; J. E. HARLAND; and ALLEN AUSTIN, RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUMMARY OF ARGUMENT

The decision of the Seventh Circuit in this case is in accordance with recent decisions of this court on the issue of sovereign immunity of the states. Such immunity was not abrogated by Congress with enactment of the Civil Rights Act of 1871.

This case is an action against the State of Illinois, not against the named individuals, since the issue is the state's own interest in real property. Therefore, the legal fiction which permits civil rights suits against officials as distinct from the state is not applicable.

With respect to Petitioner's Fourteenth Amendment claim, issues of state law are controlling. The Petitioner assumes the state can abandon its interest in real property, and that the Illinois Court of Claims cannot provide a remedy. These are untrue, or, at best questionable, assumptions which should

not be used as a basis for action by this court.

I. THE DECISION OF THE SEVENTH CIRCUIT IS IN ACCORDANCE WITH PRONOUNCEMENTS OF THIS COURT.

The Petitioner asks this Court to decide, once again, whether the Civil Rights Act, 42 U.S.C. sec. 1983, abrogates the constitutional immunity enjoyed by the State of Illinois pursuant to the Eleventh Amendment to the Constitution. This Court has repeatedly held, as did the Seventh Circuit, that it does not. **Quern v. Jordan**, 440 U.S. 332 (1979); **Alabama v. Pugh**, 438 U.S. 781 (1978); **Edelman v. Jordan**, 415 U.S. 651 (1974). The rule was recently restated in **Pennhurst State School and Hospital v. Halderman**, _____U.S.____,104 S.Ct. 900 (1984).

The Petitioner suggests that the Seventh Circuit "confuses the constitutional immunity issue with the statutory "person" issue and treats the two questions as one." (Petition p. 28). Petitioner ignores the fact that, as

set forth in this Court's analysis in the **Edelman** and **Quern** cases, the two questions are one. The State and its agencies are entitled to constitutional immunity unless that immunity is waived either by an act of the State or an act of Congress. Because Congress in enacting sec. 1983 did not override the traditional sovereign immunity of the states, the states are not statutory persons.

There can be little question that this is a suit against the State of Illinois. While three state officers are nominally defendants, along with the Illinois Department of Transportation, it is clear that the relief sought is against the State, not against the officers.

In 1956 the State of Illinois acquired from Plaintiff a possessory interest in certain real estate, paying the full appraised value of the fee interest. The Plaintiff in this suit seeks a ruling that the State has, by its action or inaction, forfeited its right to

that possessory interest. The whole purpose of the suit is to determine what, if any, right the State retains with respect to the property. This is not a case subject to the doctrine of **Ex parte Young**, 209 U.S. 123 (1908). The individual state officers have no interest in the property, nor can they transfer any interest held by the State absent specific statutory authority to do so. In fact, it is questionable whether, in their official capacity, they have any authority to quiet title in the Plaintiff as originally directed by the district court. (See section II B, infra). The trial court recognized this fact in its order of June 1, 1983. (Petition, p. A-45-46).

The Petitioner suggests the principles of sovereign immunity do not prevent a federal Court's initial inquiry concerning the validity of the Plaintiff's claim to title. This is an argument initially rejected by this court in **Larson v. Domestic and Foreign**

Commerce Corp., 337 U.S. 682 (1949). As stated by the Court in **Larson**, such an argument confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action. 337 U.S. at 692. The court has recently had occasion to reexamine the principle in **Florida Department of State v. Treasure Salvors, Inc.**, 458 U.S.670, 102 S.Ct. 3304 (1982). Therein, both Justice Stevens' plurality opinion and Justice White's separate opinion rejected a court of appeals holding which was in accordance with the argument made by Petitioner in this case. As observed by Justice White, it is equivalent to asserting that suits against a state are permitted by the Eleventh Amendment if the result is that the state loses. 458 U.S. at 703.

In **Florida Department of State** it was observed that the state had no colorable claim to the property in question. The same cannot be said in the case at bar, as the only

documentary evidence shows the State of Illinois has a permanent easement for highway purposes with respect to the land in question. Petitioner seeks to have that easement extinguished and would have the federal court find jurisdiction on the basis that the easement has been abandoned, notwithstanding the State's repeated and vigorous denials of the abandonment.

II. THE ISSUE OF WHETHER THE EXISTENCE OF A STATE COURT OF CLAIMS DEFEATS FEDERAL JURISDICTION OVER FIFTH AND FOURTEENTH AMENDMENT PROPERTY CLAIMS IS NOT RIPE FOR DECISION IN THIS CASE

Apparently as an alternative to its sec. 1983 claim, the Petitioner asserts federal jurisdiction on the basis of the Fourteenth Amendment. The Petitioner acknowledges that, as set out in this court's opinions in **Parratt v. Taylor**, 451 U.S. 527 (1981) and in **Larson**

v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949), the existence of an adequate state Court of Claims remedy defeats federal jurisdiction in a Fourteenth Amendment property claim case. The petitioner reasons, however, that where a Court of Claims remedy is inadequate federal jurisdiction should attach to vindicate plaintiff's Fourteenth Amendment right.

The difficulty with Plaintiff's argument is that it assumes, first, that Illinois law permits a state agency to abandon an interest in land, and second, that the state Court of Claims remedy is inadequate. Both are issues of state law on which there is no authority to support Plaintiff's position, and which the lower courts in this case have failed to consider.

A. THE ILLINOIS COURT OF CLAIMS AFFORDS PLAINTIFF DUE PROCESS

Other than the bare allegations of the Plaintiff's Complaint that it could not attain a complete remedy in the Illinois Court of Claims pursuant to the Court of Claims Act, Ill.Rev.Stat. Ch. 37, sec. 439.1 et seq. (1981), there has been no showing whatsoever on the part of the Plaintiff that it has been denied due process. There was no finding by the district court of a denial of due process. The trial court did mention in its September 4, 1981 order, with reference to Defendants' contention that a remedy may be had in the Court of Claims, that "it is far from certain that that is a valid position." However, the trial court found that it did not need to determine whether the Court of Claims accorded due process, as the existence of a state remedy did not bar the federal action. (Petition p. A-20). The lower court

considered no evidence and made no ruling on whether the Illinois Court of Claims Act, and the procedures therein, would provide Plaintiff with due process in accordance with the State and United States Constitutions.

The Court of Claims Act has previously been held to be constitutional. **Seifert v. Standard Paving Company**, 64 Ill.2d 109, 355 N.E.2d 537 (1976). In addition, as a matter of law it is clear that several of the conclusions in Plaintiff's complaint with respect to the jurisdiction of that court, and the availability of a remedy to Plaintiff there, are incorrect. In fact, it appears, after a thorough review of the Court of Claims jurisdiction, that the remedies available in that forum are greater than those which have been accorded to the Plaintiff in the federal court.

The Plaintiff contends in his Complaint that "the maximum amount that can be awarded to any claimant is $100,000 regardless of the

loss sustained and the Court of Claims lacks equity jurisdiction." (Complaint, p. 4). While it is true that the Court of Claims lacks general equity jurisdiction, it can and does grant equitable relief in certain instances. For example, in **Hicks v. State**, 32 Ill.Ct.Cl. 529 (1978), the court exercised such equitable power to reform a deed, after discussing its jurisdiction to do so. Further, the Court of Claims can entertain a Declaratory Judgment action. **Orr Construction Company v. State**, 30 Ill.Ct.Cl. 266 (1975). Court of Claims use of such equitable remedies has been approved by the Circuit courts of the state. **G. H. Sternberg Company v. Bond**, 30 Ill.App.3d 874, 333 N.E.2d 261 (5th Dist. 1975)); **Liebman v. Board of Governors of State Colleges and Universities**, 79 Ill.App.3d 89, 398 N.E.2d 305, 34 Ill.Dec. 63 (1st Dist. 1979). A similar action could have adjudicated the rights of the parties in the present case, just as the federal court has

done. The Court of Claims, in addition to adjudicating the rights of the parties to the property in dispute, could have granted the Plaintiff a money judgment for invasion of its property rights. The federal court could not.

The Plaintiff contends that awards in the Court of Claims are limited to $100,000. But, while it is true that tort claims in the Court of Claims limit a claimant to $100,000 in recovery, the limit on tort awards would not necessarily apply to the Plaintiff's claim for the alleged taking of its property. Further, there is apparently no limit on the court's jurisdiction to order the return of specific property, within its jurisdiction to hear "all claims against the State founded upon any law of the State of Illinois...". Ill.Rev. Stat. Ch. 37, Sec. 439.8(a). The Illinois Constitution provides that property shall not be taken without due process. Const. Art. 1 sec. 2. (1970). This is surely a law of the

State pursuant to which the Court of Claims should have jurisdiction.

The Plaintiff also claims the Court of Claims Act is unconstitutional by reason of the fact that it does not accord to Plaintiff all the procedures which would be available to it in federal court. Again, there is no evidence in the record as to the procedures of the Court of Claims. However, it is elementary that a litigant need not be accorded the full protection of the Federal Rules of Civil Procedure in order to be accorded due process of law. **Parratt v. Taylor**, 451 U.S. 527 (1981). The Plaintiff in this case has not shown that it has been denied the opportunity to make a claim against the State, provide evidence on its own behalf, and have its claim decided fairly and impartially by an unbiased decisionmaker. The lower court in this case effectively refused to hear any such argument, and simply discounted the numerous State authorities

which have upheld the Court of Claims Act and ruled that its jurisdiction is exclusive with respect to claims such as Plaintiff's. **E.g. S. J. Groves and Sons v. State**, 93 Ill.2d 397, 444 N.E.2d 131, 67 Ill.Dec. 92, appeal dismissed, 103 S. Ct. 3103 (1983); **Gordon v. Department of Transportation**, 109 Ill.App.3d 1071, 441 N.E.2d 904, 65 Ill.Dec. 589 (1982); **Sass v. Kramer**, 72 Ill.2d 485, 381 N.E.2d 975, 21 Ill.Dec. 528 (1978).

If there is a legitimate question as to whether the Court of Claims has jurisdiction to provide Plaintiff with a remedy in this case, that is a question to be determined by the legislature and courts of the State of Illinois, not by federal courts. Plaintiff should, at least, be required to seek his remedy in the Court of Claims, and only upon a finding by that forum of its inability to provide Plaintiff with complete relief (assuming Plaintiff were to prove its claim) should the Plaintiff be allowed to claim, in

essence, that the Illinois Court of Claims Act is unconstitutional as applied to it.

B. UNDER ILLINOIS LAW, THE DEPARTMENT OF TRANSPORTATION CANNOT ABANDON AN INTEREST IN REAL PROPERTY WITHOUT COMPENSATION.

The Plaintiff's position, and the premise upon which the above arguments are made, is that common law principles of abandonment apply to the Defendant State. Defendants submit that such an assumption is unwarranted, and that common law principles of abandonment have been changed by statute with respect to a property interest held by the State or its agencies.

The authority to dispose of property of the state is vested in the General Assembly and, in the absence of statutory authorization, a department, board, or commission lacks power to dispose of any interest in such property.

Edwardsville v. County of Madison, 251 Ill. 265, N.E.238 (1911); **Harris v. Board of Supervisors**, 105 Ill. 445 (1883); 1912 Op. Atty. Gen. 1077. There are currently two statutes which deal with the vacation, sale or exchange of highway lands or properties by the State. One of them, Ill.Rev.Stat. Ch. 121, sec. 9-127, concerns the title to highways "vacated under or by virtue of any Act of this State or by the highway authority authorized to vacate" highways. The other, Ill.Rev.Stat. Ch. 121, Sec. 4-508, provides:

> "4-508.(a) Except as provided in paragraph (c) of this Section, and subject to written approval of the Governor, the Department may dispose of, by public sale, at auction or by sealed bids, any land, rights or other properties, real or personal, acquired for but no longer needed for highway purposes or remnants acquired under the provisions of Section 4-501, provided that no such sale may be made for less than the fair appraised value of such land, rights, or property.
>
> "(b) except as provided in paragraph (c) of this Section, and subject to the written approval of the Governor, the Department may echange any land, rights or property no longer needed for highway purposes, or remnants, acquired under the

> provisions of Section 4-501 of this Code for equivalent interests in land, rights or property needed for highway pruposes. Where such interests are not of equivalent value cash may be paid or received for the difference in value."

Subsection (c) of the statute concerns disposition of residential property and is not relevant to the current matter.

Section 9-127 clearly shows that highway right of way is to be vacated only by an Act of the State or in a manner authorized by the highway department. Section 4-508 clearly provides that an interest in real property may be disposed of only with approval of the governor and for cash or property of equivalent value. Neither provision allows the department to simply walk away and abandon an interest in a piece of property which has some considerable value to the State. Thus, the department, as an agency of the State, cannot, by mere non-use, abandon a property interest of value to the State without the express authorization of the General Assembly,

which has sole authority to dispose of State owned property. Defendant Kramer herein, as Director of the Department of Transportation, cannot quiet title to property in Plaintiff without approval of the governor or legislature.

The proposition that the State cannot abandon property absent authorization by the legislature is one which has not been decided by the courts of Illinois. However, it is not unprecedented. In **Poe v. Department of Transportation**, 32 Or.App. 493, 600 P.2d 939 (1979), the Oregon Appellate Court decided that, where the state legislature had provided a statutory scheme for the disposition of highway department property, the department could not abandon property without following the scheme, no matter how indefinite it may be. Similarly, in this case the Illinois legislature has provided a statutory scheme for the disposition of property no longer needed for highway purposes, so the department

cannot abandon an interest in property without following that scheme.

The principle that the State cannot abandon property absent specific authorization by the legislature is also supported by the rule that a statute of limitations does not run against the State. It was a principle of English common law, later adopted by the courts of this country, including those of the State of Illinois, that title to property by adverse possession cannot be gained as against the sovereign. **Black v. Chicago B & Q R. R. Company**, 237 Ill. 500, 86 N.E. 1065 (1909). Thus, one who possesses and uses property of the State without authorization or right for a period of twenty years cannot gain title to the property by adverse possession. Such a rule would be of little use if that same individual could, merely by claiming that the State's lack of use of the property constituted abandonment, claim title to it as abandoned property. A much more logical, and

consistent, rule would be that the State does not lose title to an interest in property by non-use or abandonment absent some affirmative official act on the part of the State showing its clear intention to give up its interest. Such a rule is particularly suitable where, as in Illinois, the legislature has provided a means of disposition of unused or unneeded property.

Once again, this is a question of state law, which should be determined by the courts of the State of Illinois, not by a federal court which must assume a decision against the interest of the state in order to uphold its own jurisdiction.

CONCLUSION

This honorable court should deny the Petition for a Writ of Certiorari in this case because the constitutional issues raised by the Petitioner are points that are well

settled by recent opinions of this court. The decision of the Seventh Circuit is in accordance with these recent decisions. Further, a proper discussion of and decision in this case would necessarily require the discussion of at least two matters which are strictly questions of state law and which should be decided by the State of Illinois and its courts. The District Court chose to ignore the issues of state law in order to maintain its own jurisdiction. The Apellate Court reversed. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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A P P E N D I X

Motion to dismiss is hereby granted and said cause dismissed.

(No. 74-CC-0847—Claim denied.)

ALLIE HICKS and ERMA E. HICKS, Claimant, *v.* STATE OF ILLINOIS, Respondent.

Opinion filed December 22, 1978.

JURISDICTION—*Equity and reformation of deeds.* The Court of Claims has limited equitable powers, including authority to enter an award reforming a deed, but such an award would still require some legislative action to carry out the award.

HOLDERMAN, J.

Claimants seek herein to reform a deed conveying certain real estate to the State of Illinois by adding an exception reserving to them the oil, gas and other minerals under said land. No request has been made for an award for damages, though they do ask that they have such other relief as the Court deems proper.

On the hearing, no evidence of any money damages was introduced and therefore the claim was narrowed to sole request that this Court reform the deed.

The evidence shows that on or about May 15, 1972, Claimants discussed the sale of their property with one Roger Hazlett, a representative of a firm having a contract with the State to acquire or purchase property for the State. Claimants testified that they told Hazlett that they would sell the surface of their 80-acre farm near Dolan Lake, but that they had leased the coal to Amax Coal Company for 20 years. Claimants testified that on or about June 5, 1972, Hazlett returned to their farm and gave them a check for $28,000.00. Hazlett brought a deed with him and Hicks and his wife signed it. Claimants state that Hazlett told them he had

excluded the minerals rights from the sale of the surface. In fact, the deed did not exclude the minerals rights.

Hazlett was called as a witness by Claimants. He testified that he was employed by David Sullivan Land Services, Inc., which had a contract with the Illinois Department of Conservation. He stated that on May 15, 1972, he offered Claimants $26,000.00 for their property, but that no agreement was made. Hazlett testified that on May 15, Mr. Hicks told him that he wanted to retain the minerals. Hazlett advised Hicks that he would see if there could be a conveyance without the minerals.

Hazlett further testified that the State would not accept a deed to the surface only, and that on June 5, 1972, he returned home and read the deed to Mr. Hicks in its entirety. Hazlett stated that in his opinion, Mr. Hicks understood that he was conveying both the surface and the mineral rights. The consideration for the purchase had been increased from the original amount of $26,000.00 to $28,000.00. Hazlett said he told Mr. Hicks that the State would not accept a conveyance of the surface only.

Two issues are before this Court. The first is whether or not this Court has jurisdiction to reform the deed as requested by Claimants. The second is whether the Claimants have proved that there was fraud in the procurement of the deed.

Claimants argue that unless this Court takes jurisdiction, they will be without remedy. They point out that they had originally brought suit in the Circuit Court of Hamilton County, Illinois, but that the case was dismissed, based on Ch. 127, Sec. 801, which provides:

"§801. *Immunity of State as defendant or party in Court.*

Except as provided in 'an Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named,' filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any Court."

Section 4 of Article 13 of the Illinois Constitution of 1970 provides:

"Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

The Circuit Court of Hamilton County was correct in dismissing the Claimant's case against the State. But the question remains, has the legislature granted jurisdiction to this Court to entertain a claim to reform a deed? In arguing that the Court has jurisdiction to entertain such a claim, Claimants point out that the Illinois Constitution of 1970 provides, in part, that:

"every person shall find certain remedy in the laws for all injuries and wrongs he receives to his person, privacy, property or reputation."

It is generally held that the Court of Claims has limited jurisdiction and has only such powers as are conferred on it by the legislature. See, 33A *Ill. Law & Practice,* Ch. 7, §142. The State refers the Court to *Taylor v. Michigan, 360 Mich. 146, 103 N.W.2d 769,* where the Michigan Court of Claims held that it did not have jurisdiction to hear a declaratory judgment action or to reform a contract. The State also cites *Blue Water Excavating Co. v. State, 144 N.W.2d 630,* and *Montgomery v. State, 328 N.Y.S.2d 189,* where the New York Court of Claims held that it had jurisdiction to hear claims for money only, with its equitable powers limited solely to those set forth in the Act or incidental to enforcement of a claim for money judgment.

However, as Claimants point out, there is Illinois authority to the contrary. In *Struve v. State of Illinois, 14 Ill. App. 3d 1092, 303 N.E.2d 32*, suit was brought in the Circuit Court to determine whether the terms of a lease between the State and the Plaintiff were being violated. No claim was made for money damages. The defendants moved to dismiss the case on the grounds that such an action was one against the State, and was for the Court of Claims. The Court said:

> "We agree with the contention of the defendants that the plaintiff's dispute should be submitted to the Illinois Court of Claims. Section 8 of the "Court of Claims Act" [Ill. Rev.Stat. Ch. 27, Para. 439.8(b)], relates the jurisdiction of the Court of Claims and provides that the Court shall have jurisdiction to hear and determine:
>
> '(b) All claims against the State founded upon any contract entered into with the State of Illinois.'
>
> Regardless of the relief sought, the plaintiff has made a claim against the State, founded on a contract. These claims should be resolved in the Court of Claims..."

Claimants also cite *Sternberg Co. v. Langhorne Bond, Director of the Department of Transportation, 30 Ill. App. 3d 874, 333 N.E.2d 260.* There, plaintiffs sought and obtained a temporary injunction against the Department. On appeal, the Court reversed, holding that the action was a suit against the State of Illinois, which the Circuit Court was without jurisdiction to entertain. The Court said:

> "The holding does not mean the plaintiff, if wronged, is without remedy. Plaintiff may avail itself of any remedy provided in the Court of Claims. *Allen v. State, 2 Ill. Ct. Cl. 404, New Era Construction v. State, 6 Ill. Ct. Cl. 88 and Fuhrer v. State, 22 Ill. Ct. Cl. 144.* It is clear that the jurisdiction of the Court of Claims is not limited to money claims, and that one may pursue remedies in the Court of Claims other than for recovery of a sum of money. Plaintiff can also raise any fraud as a defense in any action by the State or the insurance company on the bond."

Recently, in *Hartford Accident & Indemnity Co. v. State,* this Court held that it had jurisdiction to enter a declaratory judgment, construing an insurance policy.

The history of the Court of Claims, as described in *"The Illinois Court of Claims: A Study of State Liability,"* published by the University of Illinois Press, lends further support to this view.

The Constitution of 1870 applied the principle of sovereign immunity, and only in the General Assembly could one seek relief for wrongs for which the State was responsible. In 1877, a Claims Commission was created to hear *"all unadjusted claims* of all persons against the State of Illinois . . . according to the *principles of equity* and justice . . ."

In 1903, the Claims Commission was abolished and the Court of Claims established with jurisdiction identical to that of the Claims Commission.

In 1917, the old Court of Claims was abolished and a new one established "to hear and determine *all claims and demands, legal and equitable,* liquidated and unliquidated, ex contractu and ex delictu, which the State, as a sovereign Commonwealth, should *in equity and good conscience discharge* and pay." (emphasis supplied)

In 1945, the present "Court of Claims Act" was passed. We note that the first three provisions relating to the Court's jurisdiction speaks in broad terms:

> "A. *All claims* against the State founded upon any law of the State . . .;
>
> B. *All claims* against the State founded upon any contract . . . with the State...;
>
> C. *All claims* against the State *for damages* in cases sounding in tort . . ."

We have found no Illinois authority that limits the Court's jurisdiction to cases involving monetary damages. While this is the usual redress sought, what is there says that we can recommend to the legislature the payment of damages arising out of deed procured

by fraud, but we cannot recommend that the legislature reform the deed itself. Such a conclusion is within the expressions of the foregoing Appellate Court decisions, and within the spirit for which the Court was established.

We believe that this Court does possess limited equitable powers including authority to enter an award reforming a deed. It must be remembered that such an award would still require some legislative action to carry out the award, and that in so holding, the Court does not imply that it has general equitable powers.

Having decided that we have jurisdiction to enter an award reforming the deed here in question, we must next determine whether Claimants have established the right to reformation.

We have carefully reviewed the record herein, and conclude that Claimants have failed to meet their burden of proving that they were mislead by the agent negotiating the purchase of their property.

It is therfore ordered that this claim be denied.

Ch. 15, Sec. 210.10, Ill.Rev.Stat., 1973, to request a replacement warrant may file an action in the Court of Claims for payment.

PER CURIAM.

(No. 6777—Declaration of rights awarded.)

ORR CONSTRUCTION COMPANY, Claimant, *vs.* STATE OF ILLINOIS, DEPARTMENT OF PUBLIC WORKS AND BUILDINGS, Respondent.

Opinion filed February 3, 1975.

HARRY M. BROSTOFF, Attorney for Claimant.

WILLIAM J. SCOTT, Attorney General; SAUL R. WEXLER and MARTIN A. SOLL, Assistant Attorneys General, for Respondent.

CONTRACTS—*ambiguity.* In construing construction contract, "may" does not mean "shall" and it is not so construed.

SAME—*same.* If contract is subject to more than one reasonable interpretation, the doubt must be resolved against the party who prepared the contract and chose the language.

SAME—*same.* Clear and unambiguous language of written contract must override custom and usage of one of the parties.

SAME—*damages.* Where state improperly required contractor to use material not required by contract, contractor was entitled to damages sustained.

HOLDERMAN, J.

This claim is founded upon a contract entered into by the respondent with the claimant, a general contractor, for the construction of a particular section of Illinois Route 57 Highway in Fayette County.[1]

The facts are not in dispute. The issues, under which claimant's five-count complaint seeks damages in the

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[1]The contract is described by the Department of Public Works and Buildings as FAI Route No. 57, Project 1-57-3 (73) 134, Section 26 (1A, 1B-1, 2A, 2B-1 Fayette County. Job No. 97-133-68.

sum of $572,408.12, arise out of a dispute in the interpretation of "Special Provisions" in the contract entitled, "Removal and Replacement of Silty Topsoil Materials".

This court is called upon to resolve the legal issues by making a judicial interpretation of the contract provision in dispute. Hence, without any objections from the respondent, we granted claimant's motion to render a declaratory judgment in this cause pursuant to *§57.1 of the Civil Practice Act.* The parties concede that a declaration of their respective rights under the disputed provision of the contract which they request this court to construe may obviate the necessity for further litigation on the question of damages.

Both parties have informed the court that, if the legal question is decided in favor of the claimant, there is a possibility that the parties hereto in conference may reach a settlement on the amount of claimant's damages making it unnecessary to go to trial on that factual issue. Conversely, if the ruling is favorable to the respondent, there would be no need for further proceedings in this cause.

As essential prologue to our interpretation of the disputed section of the contract, we restate the undisputed pertinent facts. On January 24, 1969, the claimant submitted its sealed proposal for contract with the respondent under which claimant would construct the following: certain mainline grading and drainage for future pavement and ramps, as well as frontage roads, drainage structures, fencing, seeding, clearing and other work; a triple barrel box culvert; and two steel bridges. This contract, as bid upon, was prepared and drafted solely by respondent. It consists of: (a) *Plans*, (b) *Standard Speci-*

fications for Road and Bridge Construction and (c) *Special Provisions* (which supplement the *Standard Specifications.*)

The *Special Provisions* (on page 3 of the contract) provide, in relevant part:

REMOVAL AND REPLACEMENT OF SILTY TOPSOIL MATERIAL: Within the following station limits, and, as shown on the cross sections, the silty topsoil horizon is to be removed and replaced with suitable material.

This silty material shall be removed to a depth sufficient to provide a minimum thickness of 24 inches of suitable material between the bottom of the subbase and the remaining soil. The minimum depth of excavation shall be six (6) inches. The width of excavation shall extend beneath the pavement and the stabilized portions of the shoulders. The excavated material *may* be used in embankments greater than two feet in height and placed in alternate layers with suitable material. The height of embankment is to be measured from original ground to bottom of subbase. (Emphasis supplied to the keyword "may".)

The silty material as well as material excavated from ditches or other excavations which has an A-4 classification (HRB classifications) and a silt content greater than 50% shall not be placed in embankments less than two (2) feet in height.

It is hereby understood and agreed that the final determination as to the materials to be removed and replaced will be made by the Engineer in the field and the plan quantity for Earth Excavation adjusted accordingly.

[Here the contract contains a table listing 21 areas in both the northbound and southbound pavement, from station number to station numbers, in which the silty topsoil material was to be removed and replaced.]

Standard Specifications Section 202.03 (p. 31) in relevant part provides as follows:

"Unless otherwise provided in the plans or specifications, unstable and unsuitable material shall be disposed of by the contractor at his expense, outside the limits of the right of way."

Claimant, in preparing its bid for the contract, understood the above quoted special provisions and standard specifications to mean: (1) that the silty topsoil material between the indicated stations was unsuitable material and was to be removed and replaced with suitable material; (2) that the unsuitable material was to be disposed of by the contractor at his expense; (3) that, at

the contractor's election, he could use the unsuitable material for fill in embankments greater than two feet in height, provided claimant placed it in alternate layers with suitable material; and (4) that, notwithstanding the quantity for such excavation shown on the plans, the determination of what was silty material to be removed and replaced would be made by the State's Engineer and the plan quantity for excavation would be adjusted accordingly.

Claimant, relying on this understanding of the language of (3) above, determined that it could furnish a suostantially lower bid by not using said unsuitable material in embankments over two feet high, but rather by disposing of it and providing and using suitable material in the embankments. Accordingly, claimant determined and submitted its bid on that basis; namely, on claimant's election to *dispose* of the silty topsoil material and to use, instead, suitable borrow material in the embankments.

Thereafter, the claimant, having submitted the lowest bid, was awarded the job. Accordingly, on February 24, 1969, claimant entered into the aforesaid contract with the respondent. Except for the insertions of claimant's bid prices, this contract is exactly the same as that drafted by respondent for submission to all contractors for bidding.

Claimant commenced work on the job. During the course of the work, respondent's field engineer ordered claimant to use said excavated silty material in embankments of two feet or higher, contending that the election to use said materials rested with respondent. Claimant protested this interpretation of the *Special Provisions*; informed the respondent that the election to use said excavation in the embankments rested with the

claimant; that his proposal had not been based on such re-use; and apprised respondent that its order would necessitate substantial additional expense not provided for in its bid. Respondent, nevertheless, ordered claimant to use this material. Claimant complied under protest.

The issue thus presented to the court is, whether the election to use the silty topsoil (unsuitable material) rests with the claimant contractor or with the State's Engineer. The correct answer depends upon whether the grant of discretion by the word "may" in the following sentence from the "Special Provisions" supra, is addressed to the contractor to respondent's field engineer:

"The excavated material *may* be used in embankments greater than two feet in height and placed in alternate layers with suitable material."

The court takes notice that all of the other four sentences in the same paragraph from which the above sentence is lifted, are obviously all addressed to the contractor, and speak directly to *him*. They instruct *him* as to what *he shall* or *may* do, viz.

[1] The silty material *shall* be removed to a depth .....
[2] The minimum depth of excavation *shall* be 6 inches.
[3] The width of excavation *shall* extend beneath the pavement .....
[4] The excavated material *may* be used in embankments .....
[5] The height of embankments *is* to be measured from .....

Respondent admits that the sentences we have numbered 1, 2, 3 and 5 from the paragraph in question speak to the contractor.

Respondent contends, however, that *only one of the sentences* in the paragraph [the sentence we numbered 4] speaks to the engineer, and grants him discretion whether to use the excavated material in embankments over two feet. The language of this paragraph plainly gives no support to respondent's contention.

Nor does the language elsewhere in the contract. We

find that, where the contract *does* give an election or judgment to respondent's engineer, there is an explicit reference to him. For example, at page 4 of the contract, under "Filling Existing Wells":

. . .

5. . . . The material of this portion of the fill, its manner of placement and compaction is *subject to the approval of the engineer* . . .

. . .

8. The balance of the hole is to be filled with sand, embankment material, or other soil *approved by the engineer*; it shall be placed in lifts and compacted *as directed by the engineer.* (Emphasis added.)

Again, following page 18 of the contract, at Special Provisions — "Steady Burning Barricade Lights":

. . . The contractor shall replace all batteries on a group basis at 45 days or such other intervals *as may be specified by the engineer.* (Emphasis added.)

Unlike any of the foregoing provisions, the sentence in dispute ["The excavated material may be used in embankments greater than two feet . . ."] contains no such explicit reference to the engineer. It logically follows that no such reference was intended.

The disputed language, it seems to use, is plain and unambiguous. It tells the contractor *he* has the choice; that he "may" use the excavated material. Plainly, it does not tell him he "may" use the excavated material *if the State so decides*, an interpretation which would still place the election with the contractor. Equally plain, the language contains no explicit directions or reference to the engineer. We must disagree with respondent's contention that none is needed. If the intention had been, as respondent contends, it would have said: the contractor *shall* use the excavated material if the engineer so decides.

"May" does not mean "shall" and it is not so construed in private contracts. *Northwestern Traveling Men's Association* v. *Crawford, 126, Ill. App. 468, 480 (1906) aff'd. 226 Ill. 57.*

In support of its position, respondent points to ¶4 in the quoted section of the Special Provisions, which reads:

> "It is hereby understood and agreed that the final determination as to the materials to be removed and replaced will be made by the Engineer in the field and *the plan quantity for earth excavation adjusted accordingly.*" (Emphasis added.)

This paragraph relates to the first paragraph and merely places the final determination of what is to be removed with respondent's engineer. It is apparent, that this authority was given to the engineer to prevent the contractor from performing excessive excavation, with a resulting excessive cost to the State, inasmuch as the compensation to the contractor for excavation was on a cubic yard basis. Our interpretation as to the intent and purpose of the above ¶4 is further supported by the closing clause of that paragraph: " . . . *and the plan quantity for earth excavation adjusted accordingly.*" If there were any question as to the interpretation of this paragraph, the closing clause eliminates it. The closing clause makes it clear that the authority of the engineer in this paragraph is solely to determine and control, for the protection of the State, the quantity of unsuitable material to be excavated, and it informs the contractor that payment would be made on the basis of the actual quantity excavated, as determined by the engineer, and not based on the plan quantity of excavation (the quantity shown on the plans). To give this paragraph any other interpretation, we believe, would emasculate and give no meaning to the words, "*and the plan quantity for earth excavation adjusted accordingly*".

We do not see any inconsistency, as respondent suggests, in the language of the two paragraphs in question. The first one says that the contractor *may* use excavated material. The other says that the field engineer shall make the final determination as the *quantity* of materials to be removed and replaced.

Even if we could in good conscience find that there is more than one reasonable interpretation of the language in question, the doubt must be resolved against the respondent, since the respondent prepared the contract and chose the language. This venerable rule of contract construction, firmly established in Illinois, is restated in *I.L.P. Contracts §221* as follows:

> "Words which are ambiguous or of doubtful construction are to be construed most strongly against the party who prepared the contract, for the reason that he chose the language and is responsible for the ambiguities in his own expression.
>
> "This rule obtains not only in grants, but extends in principle to all other engagements and undertakings; and in construing reservations or conditions inserted in a contract for the benefit of the party who makes them, where there are clauses which are doubtful or ambiguous, that construction will be adopted which is least favorable to the party making them."

Repondent's brief does not address itself to the "resolve-doubts-against-the draftsman" rule. Rather, it suggests that the intent of the disputed language in the contract is better understood by (1) reading the contract as a whole and (2) taking judicial notice of a "custom and usage" of which the claimant allegedly had or should have had prior knowledge, viz., "The State has for many years followed the custom of utilizing the silty material in embankments as much as possible for economic reasons." [Departmental Report p. 4.]

Commenting on the last contention first, we believe that it would have been a simple matter for the respondent to have stated the aforesaid custom in its contract, which is so explicit on countless other matters of much less importance. If such a provision had been stated in the written contract, the claimant would not have been misled in submitting his bid, and this claim would not have arisen.

We have carefully examined the authority respondent cites in support of its claim that custom should

override the clear and unambiguous language of a written contract. We believe it would be unconscionable for this court to announce such a rule in the case before us. Such a rule would permit other bidders in the future to be deceived by what purports to be a complete written contract in plain language on which both parties may rely. Here the specific language of the contract clearly distinguishes the case at bar from the rule on which respondent relies in *Chicago Bridge & Iron Co.* v. *Reliance Insurance Co., 46 Ill. 2d 522, 264 N.E. 2d 134 (1970).*

We must reject respondent's argument that "custom and usage" should control our interpretation of this contract, a contention that is contrary to the rules stated in *I.L.P. Contracts, §211* "Custom and usage" and the authority of *Mulliner* v. *Bronson, 14 Ill. App. 355* in which the court said:

> " . . . the accustomed mode of dealing between parties in many prior transactions, can not be sustained, for such a private and special custom could not control the express words of the contract."

Turning now to respondent's argument that a different meaning of the contract may be gleaned from reading the contract as a "whole" to the end that we would hold with *U.S. Trust Co. of N.Y.* v. *Jones, 414 Ill. 265, Ill. N.E. 2d 144 (1953),* that

> "In construing a written instrument, its letter should be controlled by its spirit and purpose, bearing in mind that the terms employed are servants and not masters of an intent, and are to be interpreted so as to subserve, and not to subvert, such intent."

Respondent then states its conclusion that, "the intent of this contract is to give complete and final supervision to the State. Nowhere within the document does any contrary intent exist." In pursuing respondent's thesis, we started with the disputed provision in which we found that the word "may" clearly gives the election

to the contractor and not the State's engineer. We then examined the rest of the contract in a futile search for other language that might change our conclusion.

We have previously reported our analysis of the *Special Provisions* and concluded that ¶4 on page 3, the only part of these provisions on which respondent relies, merely places the determination of the *quantity* of that material which is to be removed and replaced, with the engineer in the field; and directs that the *plan quantity* for each excavation be adjusted accordingly. Thus, the *only* authority delegated to the engineer by said ¶4 is limited to the *quantity of silty topsoil to be removed* (and replaced). Accordingly, ¶4's expressly circumscribed grant of authority to the *engineer* bears no relevant relationship to the use or non-use of the silty material. Our conclusion inescapably follows that the word "may" in ¶2 grants to the *contractor* the sole option to use the silty topsoil in embankments over two feet, or not to use it as claimant determines.

This close textual analysis necessitates our agreeing with claimant's interpretation of the contract and is only confirmed by reading the provisions as an entirety.

Finally, we come to that part of the "whole" contract on which respondent further attempts to support its case, the *Standard Specifications*. In this regard, respondent refers to selected sections therein, some of which are skillfully paraphrased to imply what respondent no doubt wishes it had actually said. Others are irrelevant to the issue here. We find it significant that respondent fails to mention perhaps the most relevant and important provision of all, i.e., the opening sentence of the *Special Provisions* which declares:

> The following *Special Provisions* supplement the "*Standard Specifications . . .*" and in case of conflict with any part or parts of said specifications, the said *Special Provisions* shall take precedence and shall govern.

This provision not only destroys any support for respondent's contentions, but respondent has failed to show any significant conflict between the *Special Provisions* and the *Standard Specifications*. Moreover, if it be assumed *arguendo* that there is a conflict, the contract itself defines the manner of resolution. The *Special Provisions* take precedence. These we have held, as a matter of law, clearly support claimant's interpretation of the contract, and we find no material or significant ambiguities that would require us to support our conclusion on the "resolve doubts against the draftsman" rule.

This court has held in a line of cases over many years that, when the State is responsible for such matters as delays, changes of plans, lack of coordination of prime contractors, or faulty plans, an award will be made for the increased costs incurred, as a result, by claimant contractors.

In *Arcole Construction Company* v. *State of Illinois, 11 C.C.R. 423, (1941)*, the government-prepared plans and specifications, including a "typical cross-section" of underground conditions, contained a material misrepresentation which caused the contractor to be misled to his damage. The court held the contractor entitled to recover for these damages. The thrust of *Arcole* applies here. For, whether the focus be on physical condition or right to election, the State has misled the bidder equally.

In the case at bar, the contract clearly prescribed that the contractor "may use excavated material". Nothing in the contract required the claimant to use excavated material. The engineer in the field had no right to compel the contractor to use excavated material in place of suitable material. Clearly, the field engineer only had final determination as the *amount* of unsuitable material

to be removed and replaced, and not as to the re-use of the unsuitable material to be removed and replaced.

For all of the foregoing reasons, this court declares that the election to use or not to use the silty topsoil in embankments greater than two feet in height rested with the claimant, and that claimant is entitled to the damages which resulted from being ordered by the respondent, notwithstanding claimant's protests, to use said material in embankments greater than two feet in height.

This declaration of rights is the only relief sought by the parties in this opinion. If the parties cannot agree and enter into a joint stipulation as to the actual amount of claimant's damages, pursuant to this opinion, further litigation will be necessary on the questions of fact.

(No. 75-CC-575—Claimant awarded $600.00.)

GUARANTY CREDIT CORPORATION, Agents for SEVEN DRASK BROTHERS, Claimant, *vs.* STATE OF ILLINOIS, DEPARTMENT OF PUBLIC AID, Respondent.

Opinion filed February 4, 1975.

GUARANTY CREDIT CORPORATION, Claimant, pro se.

WILLIAM J. SCOTT, Attorney General; MARTIN A. SOLL, Assistant Attorney General, for Respondent.

CONTRACTS—*lapsed appropriation.* When the appropriation from which a claim should have been paid has lapsed, the Court will enter an award for the amount due claimant.

PER CURIAM.